

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Applications of)	
)	
POJOAQUE HIGH SCHOOL)	File No. BPLIF-920608DD
)	
For Construction Permit and License in the)	
Instructional Television Fixed Service on the A)	
Group Channels, Santa Fe, New Mexico)	
)	
HISPANIC INFORMATION AND)	File No. BPLIF-930107DA
TELECOMMUNICATIONS NETWORK, INC.)	
)	
For Construction Permit and License in the)	
Instructional Television Fixed Service on the A)	
Group Channels, Santa Fe, New Mexico)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: January 5, 2005

Released: January 10, 2005

By the Commission:

I. INTRODUCTION

1. We have before us an application for review filed by the Hispanic Information and Telecommunications Network, Inc. (HITN) on October 24, 2003.¹ HITN seeks review of the action taken by the Public Safety and Private Wireless Division (PSPWD) of the Wireless Telecommunication Bureau, by *Order on Reconsideration*, released September 26, 2003,² wherein PSPWD affirmed the April 21, 1997 dismissal³ of its application to construct and operate a new Instructional Television Fixed Service (ITFS) station on the A Group Channels in Santa Fe, New Mexico.⁴ Although, as explained below, PSPWD granted in part and denied in part the Petition for Reconsideration filed by HITN on May 21, 1997,⁵ PSPWD nevertheless affirmed the April 21, 1997 grant of a mutually exclusive application filed by Pojoaque High School (PHS).⁶ For the reasons discussed below, we deny the AFR.

¹ Hispanic Information and Telecommunications Network, Inc., Application for Review (filed Oct. 24, 2003) (AFR).

² Pojoaque High School, *Order on Reconsideration*, 18 FCC Rcd 19304 (WTB PSPWD 2003) (*Order on Reconsideration*).

³ Pojoaque High School, *Memorandum Opinion and Order*, 12 FCC Rcd 24454 (MMB VSD 1997) (*1997 MO&O*).

⁴ FCC File No. BPLIF-930107DA (Jan. 7, 1993) (HITN Application).

⁵ Hispanic Information and Telecommunications Network, Inc., Petition for Reconsideration (May 21, 1997) (PFR).

⁶ FCC File No. BPLIF-920608DD (June 8, 1992) (PHS Application).

II. BACKGROUND

2. On June 8, 1992, PHS filed an application seeking authority to construct and operate a new ITFS station on the A Group Channels in Santa Fe, New Mexico.⁷ PHS is part of the Pojoaque Valley Schools (PVS) system. On the same date, June 8, 1992, PVS also filed an application seeking authority to construct and operate a new ITFS station on the C Group Channels in Santa Fe, New Mexico.⁸ On December 12, 1992, PHS amended its application by, *inter alia*, correcting a discrepancy in its original application with regard to the total hours of formal educational programming.⁹ Subsequently, on January 7, 1993, HITN filed an application that was mutually exclusive with the PHS application. On January 25, 1993, PHS and PVS filed a request for waiver of the Commission's Rule¹⁰ limiting the assignment of no more than four channels to a licensee for use in a single area of operation.¹¹ PHS supplemented its waiver request on its own initiative on November 29, 1993,¹² and at the request of Commission staff on June 10, 1994¹³ and June 23, 1994.¹⁴

3. On April 21, 1997, the Video Services Division (Division) of the former Mass Media Bureau granted the Pojoaque Applicants' request for waiver of the four-channel limitation based on its finding that the requested channels were necessary to provide the wide range of educational and instructional programming proposed.¹⁵ The Division rejected the contention of HITN and another party that the waiver requests were untimely.¹⁶ The Division explained that the Commission has consistently

⁷ File No. BPLIF-920608DD.

⁸ File No. BPLIF-920608DB (June 8, 1992) (PVS Application). We may hereinafter collectively refer to PHS and PVS as the "Pojoaque applicants."

⁹ Amendment (filed Dec. 12, 1992) (PHS Amended Application). PVS also amended its application on the same date. Amendment, File No. BPLIF-920608DB (Dec. 12, 1992).

¹⁰ 47 C.F.R. § 74.902(d)(1) (1993).

¹¹ Letter from Arthur R. Blea, Superintendent, Pojoaque High School, to Clay Pendarvis, Acting Chief, Distribution Services Branch, Mass Media Bureau, FCC (filed Jan. 25, 1993) (Waiver Request).

¹² Letter from Peter D. Shields, Esq., Gardner, Carton, and Douglass, to Mr. William Caton, Acting Secretary, Federal Communications Commission (filed Nov. 29, 1993).

¹³ Letter from A. B. Cruz, III, Esq., Gardner, Carton, and Douglass, to Mr. William Caton, Acting Secretary, FCC (filed June 10, 1994); *see also* Letter from Clay Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, FCC, to Pojoaque High School and Pojoaque Valley Schools (May 17, 1994) ("First Staff Letter") (requesting additional information from applicants).

¹⁴ Letter from A. B. Cruz, III, Esq., Gardner, Carton, and Douglass, to Mr. William Caton, Acting Secretary, FCC (filed June 23, 1994); *see also* Letter from Clay Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, FCC, to Pojoque High School and Pojoaque Valley Schools (June 20, 1994) ("Second Staff Letter") (requesting additional information from applicants).

¹⁵ 1997 MO&O, 12 FCC Rcd at 24456 ¶ 5.

¹⁶ *Id.* at 24456 n.3; *see also, e.g.*, Hispanic Information and Telecommunications Network, Inc., Opposition to Motion for Acceptance of Late-Filed Pleading (June 23, 1994); Multimedia Development Corp., Consolidated Opposition to Motion for Acceptance of Late-Filed Responses (July 8, 1994). The Division found that Multimedia had standing to file a petition to deny as a party in interest because it operated eleven channel wireless cable system in Santa Fe and has entered into excess capacity lease agreements with HITN. *See id.*

allowed ITFS applicants to perfect their four-channel waiver requests by filing amendments after the “B” cut-off date because the supplemental information is used only for the purpose of evaluating the four-channel waiver request, an analysis that involves no comparison with competing applicants.¹⁷ However, the Division also noted that, in its comparative analysis, it would examine the Pojoaque applications as of the “B” cut-off date to determine the number of merit points to be awarded for programming.¹⁸ The Division noted that the Pojoaque applicants’ proposal reflected an average of 40 hours of ITFS programming per channel per week.¹⁹ The Division further noted that both PHS and PVS amended their excess capacity leases with Ruralvision South, Inc. (Ruralvision) to require a minimum of 40 hours per channel per week to be devoted to formal educational programming.²⁰ The Division explained that, whereas PHS will provide programming for students in high school, with an emphasis on foreign language and advanced placement programming, PVS will provide programming for students at the elementary and middle school levels.²¹ The Division found no repetition among the programs and noted that the programming on all eight channels will be presented simultaneously throughout most of the school day.²² The Division concluded that such a comprehensive schedule for over twelve different grade levels would not be possible on only four channels.²³ The Division therefore concluded that grant of the waiver was warranted.

4. In the 1997 *MO&O*, the Division also found PHS to be the tentative selectee.²⁴ Under the rules in effect at that time, in cases of mutually exclusive applications - where applicants were competing for the same or adjacent channels in the same geographic area - each application was reviewed pursuant to the Commission’s comparative process.²⁵ Whereas HITN was awarded a total of two points for observing

¹⁷ *Id.* (internal citations omitted).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* In addition, the Division noted that the Pojoaque applicants stated that the channels will also be used to provide formal educational programming to students who cannot physically attend classes or are home schooled. *Id.*

²² *Id.*

²³ *Id.*

²⁴ 1997 *MO&O*, 12 FCC Rcd at 24459 ¶ 7. PVS was found to be the tentative selectee for the C Group Channels in Santa Fe, New Mexico. *Id.*

²⁵ This procedure awarded a maximum of twelve merit points based on five criteria deemed to have been most relevant to determining the applicant best qualified to provide the service for which the ITFS spectrum had been allocated. See Amendment of Part 74 of the Commission’s Rules and Regulations in Regard to the Instructional Television Fixed Service, *Second Report and Order*, 101 FCC 2d 49, 65-72 (1985) (*Second R&O*); 47 C.F.R. § 74.913 (1993). First, four points were awarded to local applicants. Second, three points were awarded to applicants which were accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points were awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may have been awarded to applicants for specified levels of proposed ITFS programming. Fifth, one point was awarded to applicants which were existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants showed an established need for an expanded service that could not have been accommodated on their grandfathered E or F facilities. The tentative selectee was the applicant with the highest score.

the four-channel limitation, PHS was awarded a total of eight points - four points for being local; three points for being accredited; and one point for proposing at least twenty-one hours of formal educational programming per channel per week.²⁶ The Division further found that grant of PHS' application would serve the public interest, convenience, and necessity.²⁷ HITN's application was dismissed.

5. On May 21, 1997, HITN sought reconsideration of the Division's actions.²⁸ On September 26, 2003, the Public Safety and Private Wireless Division (PSPWD) of the Wireless Telecommunication Bureau granted, in part, and denied, in part, the PFR.²⁹ PSPWD affirmed the Division's grant of PHS' request for waiver of the four-channel limitation.³⁰ PSPWD explicitly rejected the contention that the Division improperly considered supplements to the waiver request that were filed by PHS.³¹ PSPWD noted that the Pojoaque applicants initially requested a waiver of the four-channel limitation on January 25, 1993, prior to the "A" cut-off date in this proceeding, and supplemented their waiver request on their own initiative on November 29, 1993 and at the request of the staff on June 10, 1994 and June 23, 1994.³² PSPWD explained that the "Commission has consistently allowed ITFS applicants to perfect their four-channel waiver requests by post "B" cut-off amendments because the supplemental information is used only for the purpose of evaluating the four-channel waiver request, an analysis that involves no comparison with competing applicants."³³ PSPWD emphasized that the Division carefully noted that it would only use the supplements in its consideration of the waiver request.³⁴

6. PSPWD further found that the Division correctly determined PHS to be the superior applicant.³⁵ First, PSPWD affirmed that PHS was entitled to three merit points for being accredited.³⁶ PSPWD found that, because PHS indicated in its application that it would be providing service to its own students,³⁷ PHS was not required to submit letters of intended use.³⁸ Second, PSPWD affirmed the Division's finding that PHS was entitled to one point for proposing at least twenty-one hours of formal

²⁶ *Id.* at 24457-24459 ¶ 7.

²⁷ *Id.* at 24460 ¶ 9. PHS was granted a license to operate under call-sign WNC853.

²⁸ PFR.

²⁹ Pojoaque High School, *Order on Reconsideration*, 18 FCC Rcd 19304 (2003) (*Order on Reconsideration*).

³⁰ *See id.* at 19308-19309 ¶ 9.

³¹ *See id.* at 19309 ¶ 9.

³² *See id.* at 19309 ¶ 9.

³³ *Id.* (citing Board of Regents, Eastern New Mexico University, *Memorandum Opinion and Order*, 10 FCC Rcd 3162 (1995); Northern Arizona University Foundation, *Memorandum Opinion and Order*, 7 FCC Rcd 5943 (1992); School District No. 1, *Memorandum Opinion and Order*, 3 FCC Rcd 6392 (1988) (*School Dist. No. 1*)).

³⁴ *See id.* at 19309 ¶ 9 (citing 1997 MO&O, 12 FCC Rcd at 24456 n.3).

³⁵ *See id.* at 19309 ¶ 10. PSPWD did reverse the Division's finding that PHS was entitled to three points for being local. *See id.* at 19311 ¶ 12. Because this aspect of the *Order on Reconsideration* is not on review before the Commission, we find no need to discuss it further herein.

³⁶ *See id.* at 19309-19310 ¶ 10.

³⁷ *See* PHS Application, Section II, Question 3.

³⁸ *See Order on Reconsideration*, 18 FCC Rcd at 19309 ¶ 10 (citing 1997 MO&O, 12 FCC Rcd at 24455 n.2.).

educational programming per channel per week.³⁹ PSPWD found that PHS amended its application on December 12, 1992, prior to the “B” cut-off date in this proceeding, to correct the discrepancy with regard to the total hours of formal educational programming.⁴⁰ PSPWD noted that PHS therein stated that “the total number of hours of formal educational programming on the proposed ITFS station will be 24.375 hours per week” and attached a revised programming grid showing an average of 24.375 hours of formal education programming per channel per week.⁴¹ Therefore, even though PSPWD agreed with HITN that the Division erred in awarding PHS four merit points for being a local applicant,⁴² PSPWD nevertheless affirmed the Division’s conclusion that PHS was the superior applicant.⁴³ PSPWD concluded that the Division correctly determined PHS to be the tentative selectee for the A Group Channels in Santa Fe, New Mexico.⁴⁴ The instant AFR was filed by HITN on October 24, 2003.

III. DISCUSSION

7. HITN asserts that PSPWD erred in upholding the grant of PHS’ waiver request.⁴⁵ The HITN contends that PSPWD “erroneously focused only on whether the Division was permitted to accept post “B” cut-off amendments to the waiver request filed by PHS” and that PSPWD thereby ignored HITN’s arguments on reconsideration regarding the sufficiency of the waiver request.⁴⁶ In this respect, HITN argues that, on two separate occasions following the “B” cut-off date, Commission staff requested and failed to receive information regarding which programming schedule would be provided to PHS students for credit.⁴⁷ HITN concludes that, because the staff allegedly twice concluded that the waiver request was deficient, absent the requested information, it acted in an arbitrary and capricious manner by subsequently granting the deficient waiver request.⁴⁸ In addition, HITN argues that, to the extent that past staff decisions have incorrectly allowed the ongoing consideration of four channel waiver amendments filed after the “B” cut-off date, such precedent must be overturned.⁴⁹ HITN further contends that, even if PHS were basically qualified and a comparative analysis were therefore necessary, PSPWD erred in finding that the Division correctly awarded PHS one merit point for its programming proposal and three

³⁹ See *id.* at 19310 ¶ 11.

⁴⁰ See *id.*

⁴¹ See *id.* at 19310 ¶ 11 (*quoting* PHS Amended Application).

⁴² See *id.* at 19311 ¶ 12. The Division concluded that PHS was not local to Santa Fe because (1) there are communities in between Pojoaque and Santa Fe, (2) the communities have different school districts, and (3) Rand McNally does not include Pojoaque within its definition of the Santa Fe metropolitan area. *Id.*

⁴³ See *id.* at 19311 ¶ 13. Whereas HITN was awarded a total of two points for observing the four-channel limitation, PHS was entitled to four points – three points for being accredited; and one point for proposing at least twenty-one hours of formal educational programming per channel per week. See *id.*

⁴⁴ See *id.*

⁴⁵ AFR at 9-11.

⁴⁶ AFR at 9.

⁴⁷ AFR at 11-12.

⁴⁸ AFR at 12.

⁴⁹ AFR at 15.

merit points for accreditation.⁵⁰ Therefore, HITN concludes that the Commission must reverse the decision below, rescind the grant of the PHS Application, and reinstate and grant the HITN Application.⁵¹

8. We agree with PSPWD that the Division correctly determined that PHS was entitled to a waiver of the Commission's rule⁵² limiting the assignment of no more than four channels to a licensee for use in a single area of operation.⁵³ As explained by both PSPWD and the Division, the Commission has consistently allowed ITFS applicants to perfect their four-channel waiver requests by filing post "B" cut-off amendments because the supplemental information is used only for the purpose of evaluating the four-channel waiver request, an analysis that involves no comparison with competing applicants.⁵⁴ Indeed, we recently affirmed that post "B" cut-off amendments to perfect four-channel waiver requests were permissible.⁵⁵ We therefore reject HITN's request that we overrule prior cases allowing post "B" cut-off amendments and prohibit such amendments.⁵⁶

9. We reject HITN's argument that PSPWD ignored arguments raised in the PFR as to the sufficiency of the waiver request, as amended.⁵⁷ We find that HITN did not, in fact, raise any specific objections to the waiver request, as amended, in the PFR. Rather, the PFR generally asserted that, even if PHS timely filed supplements to perfect its waiver request, "the grant of the waiver to PHS is not justified."⁵⁸ Aside from such general assertions, the form, content, and structure of the arguments raised by HITN in the PFR rested upon its premise that the Commission may only consider the waiver request as initially filed and not as amended.⁵⁹ To the extent that HITN offers specific objections to the grant of the amended waiver request for the first time in the AFR, we decline to consider those specific objections because they were not offered below.⁶⁰

⁵⁰ AFR at 17-19.

⁵¹ See AFR at 22.

⁵² 47 C.F.R. § 74.902(d)(1) (1993).

⁵³ See *Order on Reconsideration*, 18 FCC Rcd at 19308-19309 ¶ 9.

⁵⁴ See *Order on Reconsideration*, 18 FCC Rcd at 19308-19309 ¶ 9 (citing Board of Regents, Eastern New Mexico University, *Memorandum Opinion and Order*, 10 FCC Rcd 3162 (1995); Northern Arizona University Foundation, *Memorandum Opinion and Order*, 7 FCC Rcd 5943 (1992); School District No. 1, *Memorandum Opinion and Order*, 3 FCC Rcd 6392 (1988) (*School Dist. No. 1*)); see also 1997 MO&O, 12 FCC Rcd at 21559 n.3.

⁵⁵ See Clark County School District, *Order on Reconsideration*, FCC 04-XXX (rel. Oct. XX, 2004) at ¶ 11.

⁵⁶ AFR at 13-15.

⁵⁷ See AFR at 9 (citing PFR at 3-7, 10-15). Because PSPWD found that the Division properly considered the supplements to the waiver request, it therefore found it unnecessary to consider HITN's arguments as to the sufficiency of the waiver request, as initially filed. See *Order on Reconsideration*, 18 FCC Rcd at 19309 n.42. PSPWD further noted that HITN did not argue in the PFR that the waiver request, as supplemented, was insufficient to warrant granting a waiver of the four-channel limitation. See *id.*

⁵⁸ See PFR at 1-2; see also, e.g., PFR at 12 (asserting that the waiver request falls "woefully short of the heavy burden required by Commission rule and case precedent.").

⁵⁹ See, e.g., PFR at 12-15.

⁶⁰ See 47 C.F.R. § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the delegated authority has been afforded no opportunity to pass."); see also Carol B. Ingram, *et. al.*, (continued....)

10. HITN also complains that the Division staff's decision to seek additional information from PHS concerning its waiver request was prejudicial to HITN and delayed the provision of service to the public.⁶¹ We decline to reverse the grant of PHS' application based upon this argument. The Commission's staff has the full authority to make inquiries or seek additional information on its own motion.⁶² We do not believe that the staff's decision to seek additional information concerning PHS' waiver request was an abuse of that authority.

11. We also affirm the conclusion that PHS was the comparatively superior applicant. First, we find that PHS was entitled to three merit points for being accredited.⁶³ HITN contends, however, that PHS did not meet the accreditation criteria because it failed to demonstrate in its application prior to the "B" cut-off date that it would use the station to provide formal educational programming.⁶⁴ HITN's argument confuses the eligibility criteria for accredited and non-accredited ITFS applicants. The discussion of letters in the *Second Report and Order* cited by HITN refers to eligibility showings by non-accredited ITFS applicants.⁶⁵ Another category of eligible applicants described by the Commission was "educational institutions engaged in the formal education of enrolled students (e.g., public and private schools, colleges and universities). . ."⁶⁶ It is undisputed that PHS is accredited by the New Mexico State Board of Education and that PHS provides formal educational programming to its students.⁶⁷ PSPWD and the Division both clearly explained that PHS was not required to submit letters of intended use because it was accredited and proposed to serve its own students.⁶⁸ Therefore, we find that staff properly considered only those filings that were submitted by PHS prior to the "B" cut-off date to correctly conclude that PHS was entitled to three merit points for accreditation.

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Memorandum Opinion and Order, 11 FCC Rcd 4100 ¶ 3 (1996); Kenny D. Hopkins, *Memorandum Opinion and Order*, 5 FCC Rcd 604, 605 ¶ 12 (1990).

⁶¹ AFR at 16-17.

⁶² See *Tidewater Radio Show, Inc.*, *Memorandum Opinion and Order*, 75 FCC 2d 670, 677 ¶ 15 (1980). We note that HITN does not allege any violation of the *ex parte* rules.

⁶³ See *Order on Reconsideration*, 18 FCC Rcd at 19309-19310 ¶ 10; *1997 MO&O*, 12 FCC Rcd at 21561 ¶ 7.

⁶⁴ AFR at 21 (citing Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, *Second Report and Order*, 101 FCC 2d 50, 60-61 ¶ 25 (1985) (*Second Report and Order*)).

⁶⁵ *Second Report and Order*, 101 FCC 2d at 60-61 ¶ 25 (internal citation omitted) ("All applicants lacking accreditation must perfect their eligibility by showing that they will serve the needs of students of accredited schools. Otherwise, they may not enjoy the support of the schools or other organizations they propose to serve, or they may not be accountable to them, and the essential purpose of the ITFS service, which is to provide formal educational programming to students enrolled at accredited schools, may not be met. In the interim application processing period established by Further Notice (83-523), applicants attempted to demonstrate the participation of their intended school receive sites by securing letters or other documentation from these entities. In most cases, the letters were vague and did not effectively demonstrate the schools' demand and intended use for the ITFS services proposed. Since the utilization of the offered programming service by specified receive sites constitutes the basis for any proposed ITFS operation, all applicants not proposing to provide formal educational programming to their own enrolled students must submit letters from those receive sites utilizing their programming.").

⁶⁶ *Id.* at 60 ¶ 23.

⁶⁷ See PHS Application.

⁶⁸ See *Order on Reconsideration*, 18 FCC Rcd at 19309 ¶ 10; *1997 MO&O*, 12 FCC Rcd at 24455 n.2.

12. Second, we further find that PHS was entitled to one point for proposing at least twenty-one hours of formal educational programming per channel per week.⁶⁹ PHS amended its application on December 12, 1992, prior to the “B” cut-off date in this proceeding, to correct the discrepancy with regard to the total hours of formal educational programming.⁷⁰ PHS therein stated that “the total number of hours of formal educational programming on the proposed ITFS station will be 24.375 hours per week” and attached a revised programming grid showing an average of 24.375 hours of formal education programming per channel per week.⁷¹ We therefore agree with PSPWD that, even though PHS did not submit a new page 8 to the application with an “F” typed next to the program titles, the text of the amendment indicated that the program schedule proposed formal educational programming.⁷² We find that our action in this matter is fully consistent with applicable Commission precedent.⁷³

13. Therefore, we affirm that PHS was the superior applicant.⁷⁴ Whereas HITN was awarded a total of two points for observing the four-channel limitation, PHS was entitled to four points – three points for being accredited; and one point for proposing at least twenty-one hours of formal educational

⁶⁹ See *Order on Reconsideration*, 18 FCC Rcd at 19310 ¶ 11; 1997 MO&O, 12 FCC Rcd at 21561-21562 ¶ 7.

⁷⁰ See PHS Amended Application; see also *Order on Reconsideration*, 18 FCC Rcd at 19310 ¶ 11; 1997 MO&O, 12 FCC Rcd at 21561-21562 ¶ 7. All ITFS applicants are required to detail their formal educational and other ITFS programming proposals in both a programming grid and an illustrative schedule. See FCC Form 330, Questions 5-6. When PHS filed its original application on June 8, 1992, it specified a total of four hours of formal educational programming per channel per week in its programming grid. See PHS Application. However, PHS detailed an average of 24.375 hours of programming per channel per week in the submitted programming schedule. See PHS Application.

⁷¹ See PHS Amended Application; see also *Order on Reconsideration*, 18 FCC Rcd at 19310 ¶ 11 (quoting PHS Amended Application); 1997 MO&O, 12 FCC Rcd at 21561-21562 ¶ 7. Question 5 of FCC Form 330 states, in pertinent part, that for each channel requested, the applicant must complete the chart on the following page to provide “a proposed weekly schedule of ITFS programming together with a brief description of programs not recognizable by their titles.” Applicants must also “[i]ndicate by “F” [for formal] those programs which are delivered to enrolled students for academic credit.”

⁷² See *Order on Reconsideration*, 18 FCC Rcd at 19310 n. 56; see also 1997 MO&O, 12 FCC Rcd at 21561 ¶ 7.

⁷³ HITN correctly notes that “[i]t is long-standing Commission precedent that where the amounts and types of programming proposed in a schedule and grid are inconsistent, the Commission will consider for comparative purposes the amount and type that will result in the least number of points.” AFR at 18 (citing *Hispanic Information and Telecommunications Network, Inc.*, *Memorandum Opinion and Order*, 7 FCC Rcd 5924 (1992) (1992 HITN MO&O); *Van Vleck Independent School District*, *Memorandum Opinion and Order*, 7 FCC Rcd 7231 (1992) (*Van Vleck*); *Gonzales Independent School District*, *Memorandum Opinion and Order*, 8 FCC Rcd 404 (1993) (*Gonzales*); *Fishburne Military School et al.*, *Memorandum Opinion and Order*, 11 FCC Rcd 18589, 18590 (1996) (*Fishburne*)). However, our decision in this matter is fully consistent with the decisions referenced by HITN. Indeed, in all four cases HITN references, the Commission awarded no merit points for programming to applicants who failed to resolve discrepancies in their applications, prior to the “B” cut-off date, between the number of hours of ITFS programming proposed in the illustrative schedule (but not designated as formal) and the number of hours of formal ITFS programming proposed in the programming grid. See 1992 HITN MO&O, 7 FCC Rcd at ¶ 6; *Van Vleck*, 7 FCC Rcd at ¶ 5; *Gonzales*, 8 FCC Rcd at 404-405 ¶ 4; *Fishburne*, 11 FCC Rcd at 18591-18593 ¶¶ 5-7. In comparison, the instant matter is clearly distinguishable because PHS resolved the discrepancy prior to the “B” cut-off date. See, e.g., *Unified School District #511 et al.*, *Memorandum Opinion and Order*, 8 FCC Rcd 7060, 7061 n.4 (noting that, had the applicant filed an amendment to clarify the number of hours of proposed formal programming hours, prior to the “B” cut-off date, it would have received programming points).

⁷⁴ See *Order on Reconsideration*, 18 FCC Rcd at 19311 ¶ 13.

programming per channel per week.⁷⁵ We affirm that the Division correctly chose PHS as the tentative selectee for the A Group Channels in Santa Fe, New Mexico.⁷⁶

IV. CONCLUSION AND ORDERING CLAUSES

14. We affirm the decisions below that PHS properly received a waiver of the four-channel rule and that PHS was comparatively superior to HITN. We therefore deny the AFR.

15. **ACCORDINGLY, IT IS ORDERED** that pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by the Hispanic Information and Telecommunications Network, Inc. on October 24, 2003 **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁷⁵ *See id.*

⁷⁶ *See id.*